UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KELLI SMITH, individually and on behalf of a class of similarly situated female employees, RACHEL MOUNTIS, AMY SHURSKY, and KATE WHITMER,

Plaintiffs,

-vs-

MERCK & CO., INC., *et al.*,

Defendants.

CIVIL ACTION NUMBER:
3:13-cv-02970-MAS-LHG

MOTION HEARING

Clarkson S. Fisher United States Courthouse
402 East State Street
Trenton, New Jersey 08608
November 9, 2017

B E F O R E: HONORABLE MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

SANFORD HEISLER SHARP, LLP
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and
THOMAS J. HENDERSON, ESQUIRE
On behalf of the Plaintiffs.

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BY: MICHAEL S. BURKHARDT, ESQUIRE
and
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On behalf of the Defendants.

Certified as True and Correct as required by Title 28, U.S.C., Section 753
/S/ Cathy J. Ford, CCR, CRR, RPR

THE DEPUTY COURT CLERK: All rise.

(Open court begins at 11:26 a.m.)

THE COURT: Please be seated.

Good morning, Counsel.

COUNSELS: Good morning, your Honor.

THE COURT: We're here today in the matter of Smith versus Merck, *et al.*, Docket Number 13-2970.

May I have appearances of counsel, please.

MR. KORNBLITH: Russell Kornblith for the plaintiffs, your Honor, here with my colleague Thomas Henderson.

MR. BURKHARDT: Michael Burkhardt, your Honor, and my colleague Krissy Katzenstein on behalf of defendants.

THE COURT: This matter is before the Court on the plaintiffs' appeal of Magistrate Judge Goodman's decision to the district court regarding the proper scope of expert discovery. Now, this is plaintiffs' motion, so I'm going to allow -- I'm going to hear from plaintiff first. After, I'll hear from defense counsel. And I have a few questions for both sides, so let me go ahead and have plaintiffs' counsel start us off.

MR. KORNBLITH: Thank you, your Honor. And if possible, I would appreciate the opportunity to have a

brief rebuttal.

THE COURT: Yes. Let me ask you a question from the outset now. This appeal has been couched as an appeal of two attachments: Attachment 1 and Attachment 2. Let me just make sure I have this right.

Counsel for defendants separated the deposition questions at issue into two categories: According to defendants, Attachment 1 contains questions relevant to the compensation claims on which you are moving to certify a class, and Attachment 2 contains questions about claims that plaintiffs have abandoned.

Do you agree with this breakdown?

MR. KORNBLITH: I think that breakdown is roughly correct, your Honor. And I think that it's actually a very important distinction in some of the questions that Mr. Burkhardt asked.

With regard to the latter ones, it's very clear that those questions do not at all pertain to the opinions expressed in the report, which is, of course, one of the limitations on discovery here.

With regard to the former, those were preliminary analyses that were performed in consultation with counsel and solely for the purposes

of transmitting the results to counsel or, alternatively, they were just the preliminary analyses that would in turn be fed into draft reports.

So, your Honor, this motion calls upon the Court to decide whether Rule 26's trial-preparation protection for communications between counsel and the expert and draft expert reports preclude discovery of a party-opponent of the substance of those communications and drafts, even if not the letter of them themselves.

The preliminary analyses that are at issue here were done at counsel's direction and solely for the purposes of transmitting the results to counsel. Opposing counsel, during the deposition of Dr. Vekker, asked Dr. Vekker a number of questions about what analyses the plaintiffs in this case had asked him to perform.

We objected to those questions; we stated they were improper, and so opposing counsel then sought an end run around those questions by saying, I don't want the communications, just tell me what you did in anticipation of those communications.

In response, we directed Dr. Vekker that he could answer the questions posed by the defendants -- the questions about what was done -- but only as it

pertained to the report. In other words, we instructed him not to answer only with regard to analyses that were done solely for discussion with counsel at the request of counsel.

So the expert in this case has actually answered a lot of the discovery, if not, in fact, all of the discovery to which the defendants are entitled. What he hasn't testified to is simply his communications with counsel.

What the defendants here are seeking is to compel analyses on topics other than those to which Dr. Vekker has offered an opinion in his report. And that goes to the heart of the trial-preparation protection established by Rules 23 and -- 26(b)(3) and 26(b)(4).

Rule 26 provides that opposing counsel is not entitled to enter into questioning about the substance of plaintiffs' trial preparation. Production of the programming at issue here would reveal essentially in sequence exactly what Dr. Vekker did at plaintiffs' direction. In other words, it's going to reveal exactly what plaintiffs directed Dr. Vekker to do and thereby exactly what the -- our thought processes were. The files --

THE COURT: Counsel -- and some of this is

difficult. I have been trying to parse through some of the questions here because it really kind of cuts very narrowly in terms of what should be disclosed and what shouldn't be disclosed.

For instance -- and I'm looking at Attachment Number 1 on the first page -- and I'm not going to go through all the questions, but the second box, for example, the defendants ask whether Dr. Vekker ever ran an analysis of compensation, quote, like Dr. Vekker reflected in Table 1 where you controlled for grade, close quote.

This seems to go to the methodology and the soundness of the basis for Dr. Vekker's opinion. How can that possibly be protected? Shouldn't counsel be allowed to probe into the methodology and the soundness of the calculations?

MR. KORNBLITH: Well, your Honor, I'm actually glad that you ask about that because it's one of the questions that I wanted to speak to specifically here.

The transcript on that point will actually reveal that Dr. Vekker said that he didn't recall whether he'd run it, I believe, and he didn't recall because he didn't consider it in expressing the opinion that he actually expressed.

And I believe he was then questioned about,

Well, why wouldn't you -- wouldn't you always include that kind of control? And I believe Dr. Vekker testified that no, he wouldn't necessarily always use that control because what pay grade somebody is put into is a company-tainted variable. In other words, the company here is deciding what pay grade they put somebody into, so if you're running the regression with that control, it might make the disparity entirely disappear. That wouldn't mean that there wasn't gender disparity in pay.

I mean, here, part of plaintiffs' claim is actually that the S1 and the S2 grades do the same job and that, as a result, even though they have different pay grades, they should be analyzed in a single regression. And that's part of what Dr. Vekker testified to.

So in that case, I don't think it goes to the formulation of his opinion whether he ran the numbers or not and what the numbers showed. The more salient question for his analysis is why he did it the way that he did it. And defendants were allowed to ask that question, and they did, and they got an answer.

So I think that that brings us to actually two other important categories of analysis. In that case, the case that we were just discussing with regard to

the grade control, Dr. Vekker may have run it at our instruction. And if he did that, that doesn't necessarily have any bearing on his expert report. In other words, he didn't consider it, which is what he testified to.

There are two other categories of information that the defendants are seeking that would be revealed if the programming that we were discussing is revealed.

THE COURT: Before you go on -- so do you believe that a preliminary analysis conducted by an expert needs to be disclosed if the expert ultimately considered or relied upon the analysis in reaching an opinion?

MR. KORNBLITH: Yes. If he testifies that he considered the analysis or that he relied upon the analysis in forming his opinion, then yes, that would have to be disclosed.

In this case, it was incumbent on the defendants to elicit that kind of testimony that he relied on or considered some other analysis. But they weren't able to elicit that testimony, which is why they've now come to the Court and said, Well, basically, we want to redefine "consider" to mean something that it clearly doesn't to Dr. Vekker.

I do want to talk about two other categories of information here that are -- clearly were things that weren't considered when Dr. Vekker expressed the opinions in the report. Which, remember, the report itself has a regression relating to base pay, and Dr. Vekker opines that there is a statistically significant disparity in base pay for women in the S Grades 1 and 2.

Now, there are also -- or there may also be analyses of other claims and subjects that are not in the report. These would include things like bonuses, initial assignments, promotions, awards, leave, pregnancy. Those simply aren't relevant to the opinions expressed in the report, which are purely based on base pay.

And if the defendants do think that they are relevant to the opinions expressed in the report, the defendants are welcome to question Dr. Vekker about why he didn't consider them. That's the alternative analysis to which the portion that I'm sure we'll talk about later is referring. So that's the first category.

The second category of analyses that may be expressed in this programming have to do with settlement and damages. Again, Dr. Vekker offers no

opinion as to damages. He offers no opinion at all. And the fact that this information was done for settlement purposes would make it otherwise inadmissible. But the defendants are here seeking to discover it, as part of their request, for every analysis that Dr. Vekker ever did.

So I think what's important to know here is that -- there are a series of programming files at issue. And these programming files were created in large part as a result of a series of telephone conversations with counsel. And in those telephone conversations, counsel would ask Dr. Vekker: What happens if X is done? Dr. Vekker would generate a program and transmit the results to counsel.

Now, Dr. Vekker has testified that he didn't consider any of those analyses when he produced the analysis that he, as an independent expert, put forth in his report. The defendants, however, if they were allowed to discover these, would essentially be able to probe our thought process in developing the case, going back over a period of three years.

The production of these other analyses also isn't necessary for defendants to have a thorough understanding of what Dr. Vekker did and to cross-examine him on it. Dr. Vekker has produced the

backup files and the programming for the analysis that he actually ran, on which he actually expressed an opinion.

The rest of this is essentially the substance of the communications between plaintiffs and the expert. In other words, by seeing this, defendants are going to know what was being talked about and roughly when it was being talked about, just not the exact words that were used.

The protections and the exceptions in Rules 26(b)(4)(C)(ii) and (iii) are very careful in what they permit the defendants to discover of the communications between plaintiffs and their expert, and that should be the limit on what the defendants are here entitled to discover: facts or data that the expert considered in forming the opinions to be expressed or assumptions he relied upon in forming the opinions to be expressed.

Here, a preliminary analysis is, quite simply, not a fact or a piece of data. It's an analysis that was performed by Dr. Vekker at counsel's instruction for transmission to counsel or insertion in a draft. That's distinguished from the facts or data, the statistical data files that the defendants here produced, which are identified in Exhibit D to

Dr. Vekker's report.

So, with that said, I think that the important piece to remember here is that what the defendants are seeking to discover is essentially the substance of the communications between plaintiffs and the expert or the drafts. And if they're allowed to discover it here, Rule 26(b)(4)(C) essentially becomes a hollow shell.

Unless there are any other questions.

THE COURT: I have more questions, but I think I'm going to address -- I want to hear from the defendants, and I'll address them on your rebuttal.

MR. KORNBLITH: Yes, your Honor. Thank you.

THE COURT: Mr. Burkhardt, let me hear from you.

MR. BURKHARDT: Thank you, your Honor.

Your Honor, I'm happy to answer any questions if you have preliminary questions, or I'll just start to address.

THE COURT: There are a few questions I have at the outset. I mean, how does your position square with the amendments from 2010? I mean, if the Court affirms Judge Goodman's decision, would the effect be that the better-funded party, in essence, would hire consulting and testifying experts? In other words,

does this come down to a battle of resources?

MR. BURKHARDT: It doesn't, your Honor. And the assertion made about one area of concern relating to consulting and testifying experts and the reference to that, that's taken from committee discussions. It's not what the rule actually says. So it's important to take a step back and realize what's sort of the starting point.

The starting point is, for a testifying expert, work product protection doesn't apply. So that's in Section 23 -- in 26(b)(3)(A), work product protection for nontestifying experts doesn't apply when you have a testifying expert. In 2010, they amended the rule to craft a limited set of exceptions to apply work product protection to only two things: draft reports or certain types of attorney-expert communications.

So the construct that was created that Mr. Kornblith was just talking about made it sound like discovery is limited. In reality, the overwhelming case law is that discovery of testifying experts is broad. There is no work product protection associated with something your expert does.

There are only two limited exceptions: draft reports and communications from the attorneys to their

expert. And then there exceptions to that that say, obviously, if those communications involve facts or assumptions that the lawyers tell the expert to use, those are still discoverable.

So the starting point here is, one, the questions that were asked in his deposition were, simply, did you do something; Dr. Vekker, did you do an analysis that controlled for grade when you were analyzing the data in this case? There's nothing privileged about whether he did something in the first instance.

We are also entitled to the underlying programming that he did on that analysis because it's not protected as a testifying expert. The numerous cases, the three cases from the Ninth, Tenth, and Eleventh Circuits -- they all go right to this exact same issue. They make it clear that both the construct of the rule plus the rationale behind it would not preclude examination of this kind of information because it is data that is not an attorney-expert communication; it is not a draft report.

The cases that the plaintiffs point to in their papers involve a presentation or a communication that the expert generated. The rules are clear in

terms of being able to get at the underlying facts and information that the expert created when formulating his opinion.

Now, it's important to understand that that's the starting point. This argument about what was considered and did he consider it in his report, that's not the law. That's the question, initially, of whether you have an obligation to disclose the information.

So Rule 26 has (a)(2), which are disclosure requirements. They're akin to (a)(1), initial disclosures. They don't define the scope of discovery. They tell you this is what you must disclose. In that section, the language says you have to produce all facts or data that were considered by the expert. It used to say "facts and other information." The change to that language was only linked to the ultimate exceptions that were created saying no draft reports and no communications from your lawyers.

New Jersey case law and numerous other courts around the country define "consider" very broadly, so even if we were just thinking about it from a disclosure standpoint, it talks about anything an expert generates, reviews, reflects upon, reads, or

uses in connection with the formulation of his opinion.

And the *Yeda* case that we cited in our papers, your Honor -- even there, where the expert said, I didn't consider this other analysis that I did, the court rejected that as meeting their burden. You can't just have the expert say, no, I didn't consider it, and then say, but you generated it. And that case was really one where he was originally a, quote, consulting expert and then became a testifying expert. We don't even have that situation here.

So the standard of what an expert considers is broad. The standard for what is discoverable is broad and governed under 26(b)(1), and then the only question is, is there something that is privileged? And the original objections throughout the deposition, over and over again, were, you're asking about something that might implicate a communication.

There's pages of -- hundreds of pages of objections and back-and-forth between myself and Mr. Henderson multiple times, saying, I'm not asking you about the communications. I'm not asking you -- nor did I say to Dr. Vekker, I'm not asking you whether or not you wrote an email to the lawyers or they wrote you and said do X, Y, and Z. But I'm

entitled to see if you did an analysis and see the programming behind it.

And the example Mr. Kornblith referenced is inaccurate in what happened in the particular transcript. That one question -- and there are many, as you saw in Attachment 1 -- was, did you do an analysis that controlled for grade? It goes absolutely to the heart of his methodology. It goes to whether he tested, did alternative analyses. And the advisory committee notes are very clear that nothing in these amendments that are limited exceptions would preclude you from taking discovery on testing, alternative methods that you did, the testing of litigation materials that a testifying expert generated.

What it doesn't entitle me to get, perhaps to my chagrin when the rules were amended, but what it doesn't entitle me to get were specific email communications. Or if an expert generates a draft report, sends it to counsel, counsel starts editing it, sends it back -- that's now considered protected.

So the whole notion of well, we needed a different expert to work on the report, it sounds great in theory. It's not really what, ultimately, was done with the amendments to the rule.

If the rule was intended to say any analysis that counsel asked their testifying expert to perform is protected, that's what they would have said. The Ninth, Tenth, and Eleventh Circuits in the *Republic of Ecuador* cases all basically made this point. They said if the rule makers thought or wanted to restrict discovery of testifying experts, they would have done it. But they didn't. And it's instructive, your Honor, because it talks about the rationale why, you know, why wouldn't you do it?

And Mr. Kornblith made a passing reference to the fact that their expert is supposed to be an independent expert. That's the very reason why discovery is broad. We are entitled to test whether or not Dr. Vekker's opinions are sound. Did he do analyses controlling for grade? Did he test the things that are actually in their class certification papers?

Plaintiffs say that, for example, the merit increase policy causes an adverse result. Second page of Attachment 1, I asked him: Did you do an analysis of whether merit increases had any adverse effect based on gender?

His answer? No, subject to the objection.

Now, as the magistrate properly determined,

the objection muddies the testimony because he could have, if counsel asked him, but he may not have. He never answered the question. He would never answer that question directly. If he did, we're entitled to see the programming on that and then properly cross-examine him.

Plaintiffs argue in their opposition papers -- and I don't remember now, your Honor, if it was the reply or the original appeal -- that the section of the committee notes that talks about you are clearly entitled to discovery of alternative analyses, testing of data that a testifying expert does -- their assertion is that only means that I get to ask Dr. Vekker in his deposition, well, let me give you a hypothetical and see if you agree or don't agree with my alternative. There's nothing about that language that would suggest that that's the only meaning and that it means I'm not entitled to see if he actually did it.

The whole purpose of rules around testifying experts is to allow for broad discovery, to allow for us to have a fair and full opportunity to cross-examine this expert and, ultimately, to present an argument to the Court that, under Daubert, he has not used a sound methodology and that he had

information that showed the exact opposite, your Honor.

So -- and I'm happy, again, to answer any questions, your Honor. The only thing --

THE COURT: Why do you want the information in Attachment Number 2 if the plaintiffs are no longer pursuing those claims?

MR. BURKHARDT: Well, your Honor, one of the requirements for Rule 23 class certification is adequacy of counsel and the named representatives. There is case law that we will submit to you in our opposition papers that makes it clear that if counsel or named plaintiff abandons claims, that that is one of the issues a court should take into consideration as to whether or not these lawyers and their representative can adequately, quote/unquote, represent the interest of the class.

It's only one argument, but the issue is we've been in litigation for four years -- a complaint that has numerous other claims that were asserted.

And Dr. Vekker also was playing a little cute in his deposition where he would occasionally say, as he does in his report, the total effect of Merck's policies lead to an adverse compensation result. We're entitled to ask him, did he explore those

things? I'm entitled to ask him, did you do an analysis of this claim of the named plaintiffs in this case? You're here as an expert. You are asserting that there's a pattern and practice of discrimination at Merck. I'm entitled to know whether you did it.

And what we proposed to the magistrate, at her request, in terms of were we willing to do the compromise -- we had said, with Attachment 2, what we would like to know is, did he do it or not? Give us a verified response whether he did or he didn't, and if so, then he can articulate whether he says he considered or relied upon it or not.

We should be entitled at that point to challenge that if needed, but we separated the two things. These are clearly not related to the area of compensation that he opined on. Attachment 1 clearly relates in every way to the opinion that he expressed in his report. There's really no argument at all with respect to Attachment 1.

Attachment 2, in my opinion, is still relevant, your Honor, because we think it's relevant to the question of adequacy. And again, under the rules, there's nothing that precludes discovery of it unless it's a draft report or an attorney-expert communication.

The plaintiffs never asserted before the magistrate that what Dr. Vekker did was a draft report. They have never presented us with a privilege log. They presented no factual basis to suggest that what the magistrate concluded is clear error, which is the standard on appeal. It's great lawyer argument to say this is why Dr. Vekker did this. There's no factual support for any of that.

So our -- we proposed the compromise. We're still willing to live with the compromise between Attachments 1 and 2. Frankly, the magistrate properly concluded we're entitled to all of it because, when you look at the construct of the rules, the starting point is, as long as it's relevant -- and there's no real argument it's not relevant to the case -- everything's discoverable except two little things: communications -- which we're not asking for, we haven't asked for, and they haven't produced -- and draft reports -- we didn't ask for, we haven't asked for, and they haven't produced. Nor will we if we -- when we get to discovery.

So we accept that's part of the rule unless, again, there's still some communications that would be at issue, but the plaintiffs produced those. Things where you send an email to your expert and say, here

is the class definition; or here is, you know, the set of data that you need. Those communications are still discoverable, even under these very limited carve-outs. That's not what's at issue here. What's at issue here is, what analysis did Dr. Vekker do and when -- what is the programming behind that analysis?

Honestly, your Honor, I don't believe Dr. Vekker did many of these things, but we continuously got an objection saying subject to the standing objection, no, which was translated to meaning I didn't do it independently, but I might have done it at the direction of counsel, or I might have been asked by counsel to do it.

Well, that's not the standard under the rules to say you don't have to disclose it. If in fact he didn't do something, we're entitled to know. Okay, you never looked at that issue. Done. We shouldn't even be fighting about those. So part of the starting point was just answer the question.

The secondary piece is, we're entitled to the backup like you are with any normal testifying expert discovery so we can test the methodology he used -- did he ignore relevant information -- and present a proper argument to the Court that Dr. Vekker's opinion is not reliable and doesn't meet the Daubert standard.

One of the standards under Daubert is clear, you know -- have you tested your methodology? Can it be tested? Well, if he's out running alternative analyses on all kinds of things related to compensation, we're entitled to know that. If he never studies any of the actual theories the plaintiffs assert to support class certification, we're entitled to know that.

THE COURT: Okay. Thank you.

MR. BURKHARDT: Thank you, your Honor.

THE COURT: Mr. Kornblith. Counsel says they're entitled to the stuff at Attachment 2 because it's relevant.

MR. KORNBLITH: Well, your Honor, it's not -- it's not something that Dr. Vekker considered in expressing the opinions in his report.

The opinions in the report pertain only to base pay. And if Mr. Burkhardt believes that Dr. Vekker should have, say, considered pregnancy as one of the variables in running his base pay regression, he was entitled to ask Dr. Vekker why Dr. Vekker didn't consider pregnancy status in running those regressions.

The fact that Dr. Vekker didn't, though, doesn't impede Mr. Burkhardt's ability to raise a

Daubert challenge or something like that. Mr. Burkhardt can still question Dr. Vekker's methodology; he just doesn't need Dr. Vekker's own work product that was done at the request and instruction of counsel in order to do that.

THE COURT: Does any of this speak to adequacy of counsel or sufficiency of the requirements under Rule 23?

MR. KORNBLITH: Well, I don't believe the adequacy challenge was raised in the defendants' papers, so I would need Mr. Burkhardt to hum a few more bars of that argument in order to fully understand it.

But if the question is whether the plaintiffs are obligated to move for class certification on every claim in the complaint, the case law is pretty clear on that. We've got a footnote in our brief with at least three case citations that are to that effect, and there's no reason to believe that that would be any different here.

So with that in mind, the -- Dr. Vekker's opinions are indeed conformed to the limitations of the Rule 23 papers to the extent that we are only moving for a class certification -- for class certification on the issue of base pay; and so it is

not at all clear what the relevance of, say, an opinion on whether Merck discriminates against people who've taken leave would be to that.

If -- excuse me -- Mr. Burkhardt wants to suggest that that's somehow relevant, it's incumbent on him to make that argument to Dr. Vekker by presenting Dr. Vekker with facts or data that he should have considered and questioning Dr. Vekker about why he didn't consider those facts or data.

Mr. Burkhardt didn't do that, though. What he instead sought to do was to ask whether plaintiffs had ever asked certain questions about other facts or data.

I do want to briefly address also one of the changes in the rules that I think has been minimized here, which is the shift from information to facts or data. That shift is meant to intentionally narrow the scope of the discovery to which the defendants are entitled here.

Because facts or data are the things that the defendants produced here. They are the things identified in Exhibit D to Dr. Vekker's report. Facts or data are not the interpretations of the facts or data that Dr. Vekker then made, and that's clear in the case law of both presented by the defendants and

presented by us.

I also want to address the *Yeda* case that Mr. Burkhardt brought up. The *Yeda* case is actually somewhat on point here because it recognizes that there is a distinction between work that an expert may perform in his consulting capacity and the work that an expert may perform in his testifying capacity, and that the work done in the consulting capacity isn't necessarily facts or data that was considered in forming the opinions expressed in the testifying capacity, that that's actually a fact-driven analysis that's driven by the actual opinions expressed.

Now, in that case, what happened was that there was a very particular experiment that the expert had designed, and the court basically said, there's no way that that didn't figure into your analysis.

But that's not what's at issue here, and it's certainly not what's at issue with regard to all of the claims, for example, on bonus, additional assignments, promotions, award, leave, pregnancy, to which Dr. Vekker has expressed no opinion.

Likewise, the *Republic of Ecuador* cases to which Mr. Burkhardt refers are not nearly as clear-cut as he says. Those cases simply say that Rule 23(b)(3)(A) does not apply as a blanket

protection to all work done by an expert.

We have some disagreement with those cases, but even acknowledging those cases, that doesn't undercut Rule 26(b)(4)(C)'s protections for analyses that are done solely for the purposes of transmission to counsel.

Finally, I want to address two minor points here, which is that Mr. Burkhardt states that we never produced a privilege log in this case. The responses to subpoena that were produced here offered a privilege log. The defendants never took us up on that offer. If that's going to be helpful, it's obviously something we could provide, but that's why there is no privilege log in this case.

THE COURT: And that kind of goes to another issue here, too. Some of the arguments that you folks are putting forward -- it's just more comprehensive than what was in front of Judge Goodman, so I'm called upon to make a decision upon information that really wasn't presented to Judge Goodman.

And so it really kind of creates somewhat of a quagmire for the Court because I want to see the case move, but at the same time, I think it's a little inappropriate that we have issues now that are here that weren't there.

MR. KORNBLITH: Right. I understand the Court's position on that, and I think that's in part been a product of the back-and-forth between counsel here.

I do want to address one other minor point, which is the standard on this appeal, which the defendants state in their brief that it's clear error. I know your Honor, having been a magistrate judge before being appointed to the district court, has an understanding of this. There is a more lenient standard of review on the factual basis, but the law is reviewed *de novo*. And the *Bowen* case that the defendants state actually says that, so I don't know where we get to this clear error standard from.

THE COURT: All right, Counsel.

Here's what I'd like to do here. It's funny. I always thought discovery was so straightforward. And, as you say, I've been a magistrate judge for five years and dealt with issues like this. But I think that there are some complicating factors here that I need to look at more closely, so what I want to do is, I'm going to reserve for today. I'm going to ask my courtroom deputy to reach out to you folks and see if you folks are available on Monday, and we'll do a telephone conference on Monday, at which time I will

render my decision.

There are a few other things I want to look at. I want to look a little bit more closely at some of the issues that you folks raised on oral argument today and consider that, and then on Monday I'll issue a telephonic decision. Okay?

So with that, I want to thank you for coming in and for your oral argument, but that's all we have for today.

MR. KORNBLITH: Thank you, your Honor.

MR. BURKHARDT: Thank you, your Honor.

THE DEPUTY COURT CLERK: All rise.

(Court concludes at 12:03 p.m.)

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